

89-1623

No.

Supreme Court, U.S.

FILED

APR 17 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

In Re Application of NEWSDAY, INC.

CHARLES F. GARDNER,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MICHAEL J. DELL
(Counsel of Record)
GARY P. NAFTALIS
PETER J. GANZ

KRAMER, LEVIN, NESSEN,
KAMIN & FRANKEL
Attorneys for Petitioner
919 Third Avenue
New York, New York 10022
(212) 715-9100

QUESTIONS PRESENTED

1. Do Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), and the Fourth Amendment permit the disclosure to the public of wiretapped communications and information concerning the substance, purport or meaning thereof, over the objection of a subject of the wiretaps, merely because the government "used" the intercepted conversations in a sealed search warrant affidavit?

2. Is there a public right of access to a sealed search warrant affidavit containing wiretapped communications and, if so, is it vitiated by the Title III and Fourth Amendment privacy rights of the subject of the warrant?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Charles F. Gardner and respondent Newsday, Inc. Also appearing below were amicus curiae the United States and amici curiae Dow Jones & Company, Inc., The New York Times Company, New York Post Company, New York News Inc., and The Associated Press. Dennis Mitchell intervened in this proceeding in the district court, but did not participate in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. The Second Circuit, in conflict with at least two other Circuits, has ruled that Title III and the Fourth Amendment do not require the continued sealing of intercepted communications and information concerning the substance, purport, or meaning thereof, merely because they were “used” by the government in a search warrant affidavit	8
II. The Circuits are in conflict as to whether there is any public right of access to a search warrant affidavit containing intercepted communications, and whether such right, if any, outweighs the privacy rights of the subject of the warrant	15
CONCLUSION	18

	Page
APPENDICES:	
Appendix A	1a
Appendix B	13a
Appendix C	23a

TABLE OF AUTHORITIES

Cases:	Page
<i>Andrus v. Glover Constr. Co.</i> , 446 U.S. 608 (1980)	9
<i>Berger v. New York</i> , 388 U.S. 41 (1967)	9
<i>Gelbard v. United States</i> , 408 U.S. 41 (1972)	8
<i>In re Baltimore Sun Co.</i> , 886 F.2d 60 (4th Cir. 1989)	15
<i>In re New York Times</i> , 828 F.2d 110 (2d Cir. 1987)	11 n.1
<i>In re Search Warrant for Secretarial Area</i> (<i>Gunn I</i>), 855 F.2d 569 (8th Cir. 1988)	15
<i>John Does I-V v. The Pulitzer Publishing Co.</i> , 895 F.2d 460 (8th Cir. 1990)	13, 14 n.4, 16, 17
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	9, 16
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928) ..	8
<i>Times-Mirror Co. v. United States</i> , 873 F.2d 1210 (9th Cir. 1989)	13, 15
<i>United States v. Cianfrani</i> , 573 F.2d 835 (3d Cir. 1978).	11 n.2
<i>United States v. Dorfman</i> , 690 F.2d 1230 (7th Cir. 1982).	11, 12
<i>United States v. Gerena</i> , 869 F.2d 82 (2d Cir. 1989)	11 n.1
<i>United States v. Woods</i> , 544 F.2d 242 (6th Cir. 1976), <i>cert. denied</i> , 429 U.S. 1062 (1977)	13

	Page
<i>Walters v. National Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985)	9
Constitution, Statutes and Rules:	
First Amendment.	<i>passim</i>
Fourth Amendment	<i>passim</i>
18 U.S.C. § 2510	3
18 U.S.C. § 2517	<i>passim</i>
Federal Rule of Criminal Procedure 41(g)	13
Legislative Materials:	
S. Rep. No. 1097, 90th Cong., 2d Sess. 65, <i>reprinted in</i> 1968 U.S. Code Cong. & Admin. News 2112, 2154	9

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

In Re Application of NEWSDAY, INC.

CHARLES F. GARDNER,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner, Charles F. Gardner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered January 29, 1990 and confirmed by the denial of his petition for rehearing and suggestion for rehearing *en banc* on March 14, 1990.

OPINIONS BELOW

The opinion and judgment of the court of appeals denying petitioner's appeal from the district court (App. A, *infra*, 1a-12a) is reported at 895 F.2d 74. The opinion of the district court (App. B, *infra*, 13a-22a) is unreported. The judgment of the court of appeals denying petitioner's petition for rehearing or rehearing *en banc* (App. C, *infra*, 23a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals denying petitioner's appeal from the district court was entered on January 29, 1990 and the judgment of the court of appeals denying rehearing or rehearing *en banc* was entered on March 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant parts of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, are:

18 U.S.C. § 2517. Authorization for Disclosure and use of intercepted wire, oral, or electronic communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any state or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

STATEMENT OF THE CASE

Petitioner Charles F. Gardner seeks review of a decision of the Second Circuit Court of Appeals which authorized the unsealing and public disclosure of a redacted version of an affidavit used to obtain a warrant to search his home. The affidavit contained numerous quotations from, and summaries of the contents of his telephone conversations that had been intercepted pursuant to the federal wiretap statute, Title III. The Second Circuit found Title III does not bar disclosure of wiretapped conversations once included in a search warrant affidavit, and there is a common law right of access to such affidavits when they are filed with the court which outweighs an individual's rights to conversational privacy. (App. A at 10a-11a).

On June 13, 1988, District Judge Edward R. Korman of the Eastern District of New York signed a search warrant authorizing a search of Mr. Gardner's residence in Malverne, New York. Judge Korman ordered the sealing of the affidavit used by the government to obtain the search warrant and the warrant itself. On June 23, 1988, respondent Newsday, Inc. ("Newsday") moved to unseal those documents. At a July 15, 1988 hearing on Newsday's motion, the government opposed unsealing on the grounds

that (1) disclosure would hinder the government's ongoing investigation; (2) disclosure would violate the privacy rights of individuals referred to in the sealed documents; and (3) there is no public right of access to search warrant materials. Judge Korman ruled a redacted copy of the search warrant should be unsealed, but denied Newsday's unsealing request with respect to all but a few general paragraphs of the underlying affidavit.

On October 21, 1988, Newsday renewed its motion to unseal. Mr. Gardner opposed it because it would violate his constitutional, statutory and common law privacy rights, and those of others named in the affidavit, and would violate the federal wiretap statute, Title III. The government also opposed the renewed motion. Judge Korman denied the motion.

On October 28, 1988, Mr. Gardner filed an application for a limited unsealing of the search warrant affidavit to permit access only to himself and his counsel, while maintaining his objection to public disclosure of the affidavit. The government opposed this motion, arguing that even this limited unsealing would jeopardize the ongoing investigation. After oral argument, Judge Korman took this motion under submission.

On January 3, 1989, Newsday wrote to Judge Korman, once again requesting reconsideration of the unsealing of the affidavit in light of the unsealing by Magistrate Kenkel of the District of Maryland of two other search warrant affidavits that mention Mr. Gardner. Before the argument on this motion, on January 25, 1989, the government served a notice stating that, because of the progress of its investigation, it would not continue to oppose the unsealing of certain portions of the affidavit, although it requested that other portions remain under seal. Mr. Gardner maintained that because a search warrant affidavit is not part of an ongoing criminal proceeding, there is no public right of access to that document. In addition, because the affidavit quotes in large part from material obtained through a wiretap, Title III, as well as the constitutional and other privacy rights of Mr. Gardner, mandated continued sealing. Dennis Mitchell, to whom the affidavit also relates, joined Mr. Gardner's opposition to Newsday's motion. Judge Korman ordered the

release to Messrs. Gardner and Mitchell and their counsel, subject to a confidentiality order, of those portions of the affidavit as to which the government no longer opposed disclosure to the public. The court took under submission Newsday's renewed request for a public unsealing.

On March 9, 1989, Mr. Gardner pled guilty to a criminal information filed in the Eastern District of Virginia. Thereafter, Judge Korman ordered additional argument on Newsday's application. The government dropped its opposition to the unsealing of the affidavit in its entirety. Mr. Gardner continued to oppose unsealing for all of the reasons stated above, arguing that none of these grounds was altered by his guilty plea. On May 10, 1989, the court ordered the release of the entire affidavit only to Messrs. Gardner and Mitchell and their counsel, again subject to a confidentiality order. The court took under submission Newsday's motion for a general unsealing of the affidavit. Subsequently, on July 14, 1989, Mr. Mitchell pled guilty to a criminal information filed in the Eastern District of Virginia.

In a telephone conference on July 27, 1989, Judge Korman issued an oral opinion, holding there is a qualified First Amendment public right of access to the sealed search warrant affidavit and the federal wiretap statute does not prohibit the release of the contents of, and information concerning intercepted communications contained in the affidavit. (App. B at 16a). The court found Mr. Gardner's privacy rights were diminished by virtue of his guilty plea, but, in order to protect the privacy interests of other persons mentioned in the affidavit, directed that certain portions of the affidavit be redacted and remain under seal. (App. B at 18a-19a). Judge Korman granted a stay of his order pending an expedited appeal to the Second Circuit.

Mr. Gardner's appeal to the Second Circuit argued that (1) he had a fundamental conversational privacy interest under both the Fourth Amendment and Title III; (2) there is neither a First Amendment nor a common law public right of access to the search warrant affidavit; and (3) any public right of access would in all events be outweighed by his privacy interests. In affirming

Judge Korman's decision on January 29, 1990, the Second Circuit found it unnecessary to decide whether the district court correctly found a qualified public right of access to the sealed search warrant affidavit under the First Amendment. (App. A at 2a). Instead, the Second Circuit panel ruled there is a common law public right of access to the search warrant affidavit, and this interest is sufficient to justify unsealing the redacted affidavit and releasing it to the public. The panel reasoned that even though the affidavit recites conversations wiretapped pursuant to Title III, it is a public document, and "after [such wiretapped communications] hav[e] been used by the government in the course of its law enforcement activities," Title III is no bar to public access. (App. A at 5a). Finally, the panel concluded the common law public right of access outweighs Mr. Gardner's privacy rights. (App. A at 11a).

The Second Circuit panel did not, however, expressly address Mr. Gardner's argument that his constitutional right to conversational privacy under the Fourth Amendment perforce outweighs any right of access grounded solely in the common law. It also overlooked contrary authority in the Second and other Circuits that Title III's bar on disclosure of wiretapped communications is not vitiated merely by the government's "use" of such materials "in the course of its law enforcement activities." Although Mr. Gardner's petition for rehearing and suggestion for rehearing *en banc*, filed on February 8, 1990, raised these and other issues, the Court of Appeals denied his application on March 14, 1990, without issuing an opinion. On March 21, 1990, the Court of Appeals stayed its mandate for thirty days, pursuant to Fed. R. App. P. 41(d), pending Mr. Gardner's petition to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

- I. The Second Circuit, in conflict with at least two other Circuits, has ruled that Title III and the Fourth Amendment do not require the continued sealing of intercepted communications and information concerning the substance, purport, or meaning thereof, merely because they were "used" by the government in a search warrant affidavit

This case at its fundamental level concerns a matter long considered to be of vital importance: The extent to which an individual's fundamental right to conversational privacy can be sacrificed as a result of the intrusion of electronic interceptions of telephonic communications, or "wiretapping." As Justice Brandeis recognized decades ago, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting). This Court, vindicating the position first advanced by Justice Brandeis, has now firmly established that the Fourth Amendment protects an individual's fundamental right to conversational privacy. In two important decisions, this Court banned the use of wiretaps and other forms of electronic surveillance except in very limited circumstances. See *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

In reaction to this Court's decisions in *Katz* and *Berger*, Congress enacted Title III and sought to delineate there the narrow circumstances under which wiretapped communications, or summaries thereof, could be disclosed. As this Court has ruled, "although Title III authorizes invasion of individual privacy under individual circumstances, the protection of privacy was an overriding Congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48 (1972). Indeed, the Senate Report stresses that in authorizing limited wiretap surveillance, the threat to protected privacy interests posed by such technology was of preeminent concern:

No longer is it possible, in short, for each man to retreat to his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor.

S. Rep. No. 1097, 90th Cong., 2d Sess. 65, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2154.

Accordingly, Title III sets forth in section 2517 – aptly titled, “[a]uthorization for disclosure and use of intercepted wire, oral, or electronic communications” – the very few, express circumstances and methods by which wiretapped communications, or information derived therefrom, may be used or disclosed. The first two subsections of section 2517 authorize investigative or law enforcement officials to “use” wiretapped information in the performance of their official duties and to disclose such information to other officials for their own official use. Section 2517(3), in turn, permits any person who has acquired wiretapped information to disclose the information “while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.” Therefore, aside from the limited transfer *between law enforcement officials* during an investigation, Congress envisioned that wiretapped information would be disclosed *to the public* only when testimony is being given *during court proceedings*. Nothing in the statute authorizes the public disclosure of wiretapped information simply because it is included in search warrant affidavits filed with the clerk of the issuing court. This Court has firmly held that in situations such as this, where Congress enacts certain limited exceptions to a general prohibition, additional exceptions may not be implied in the absence of clear Congressional intent to the contrary. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

Congress having carefully balanced the competing interests implicated and having deliberately enacted a scheme authorizing limited disclosure of wiretapped information in particular situations, its judgment should have been respected and followed by the Second Circuit. *See Walters v. National Ass'n of Radiation*

Survivors, 473 U.S. 305, 319 (1985). However, the Second Circuit held that "after having been used by the government in the course of its law enforcement activities," Title III does not bar disclosure of intercepted communications contained in search warrant affidavits. (App. A at 5a). The court of appeals reasoned that while "Title III generates no right of access, . . . it is a non-sequitur to conclude the obverse; that Congress intended in § 2517, which relates solely to use [of wiretapped materials] in law-enforcement activities and judicial proceedings, to forbid public access by any other means or on any other occasion." (*Id.* at 7a). According to the Second Circuit's analysis, because search warrants and the affidavits which precede them are to be filed with the clerk's office pursuant to Rule 41 of the Federal Rules of Criminal Procedure, they are "public documents," regardless of whether they contain Title III material. (*Id.* at 7a-8a).

If the decision of the Second Circuit is allowed to stand, application of its reasoning risks eviscerating the protections carefully formulated by Congress in Title III in order to safeguard constitutional privacy rights against the intrusion and effects of wiretapping first identified by Justice Brandeis more than sixty years ago. The result of the Second Circuit's holding and reasoning in this case is that after the government "uses" wiretapped information under section 2715(2) for any official purpose, Title III's strict prohibitions on public disclosure can be overlooked. It is inconceivable that Congress could have so intended when, in section 2517(3), it carefully restricted public disclosure to "testimony under oath or affirmation in any proceeding held under the authority of the United States or of any state or political subdivision thereof." Moreover, the Second Circuit's approval of a scheme whereby each district judge may conduct his or her own balancing of the public's right of access against an individual's privacy rights in a particular case usurps the proper role of Congress which has already conducted this balance and enacted Title III as a result.

The holding and reasoning of the Second Circuit panel in this case also conflicts with that of a number of Circuits on this crucial issue of the scope of the protections afforded under Title

III to an individual subjected to the intrusion of wiretap surveillance.¹

Whereas the Second Circuit held that it is a “non-sequitur” to conclude that Title III prohibits disclosure unless expressly authorized, the Seventh Circuit has held the reverse. Judge Posner, writing for that court, explained:

But by permitting disclosure of lawfully obtained wiretap evidence only under the specific circumstances listed in 18 U.S.C. § 2517, Title III implies that what is not permitted is forbidden. . . .

United States v. Dorfman, 690 F.2d 1230, 1232 (7th Cir. 1982).² Furthermore, in contrast to the Second Circuit’s apparent belief that the *official* “use” of wiretapped information under section 2715(2) permits the public disclosure of such information in circumstances beyond those authorized in section 2715(3), Judge Posner also held:

Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if it were construed to do so, much of the statute would be superfluous, for example 18 U.S.C. §§ 2517(1)-(3).

¹ In addition, the panel’s decision appears to conflict with prior Second Circuit holdings that Title III was not rendered inapplicable merely because the government “used” wiretapped communications in a memorandum. *See, e.g., In re New York Times*, 828 F.2d 110, 114-15 (2d Cir. 1987); *United States v. Gerena*, 869 F.2d 82, 84-85 (2d Cir. 1989).

² In a similar vein, the Third Circuit has explained:

Title III affirmatively provides for the disclosure of intercepted communications only in certain carefully limited instances. Public disclosure, with limited exceptions [i.e., by switchboard operators or employees of common carriers during performance of their duties], is authorized only in accordance with § 2517(3). (footnotes omitted).

United States v. Cianfrani, 573 F.2d 835, 855 (3d Cir. 1978).

Id. at 1234-35.

Finally, whereas the Second Circuit has endorsed a system wherein each district judge can strike his or her own balance between the benefits of public access and an individual's right to privacy, Judge Posner firmly rejected such an extension of judicial authority under Title III:

We cannot find in Title III any grant of authority to judges to make that particular judgment.

* * *

Congress in Title III struck a balance between these interests [of public access and privacy] that seems reasonable to us.

Id. at 1233-34.³

Similarly, the Eighth Circuit, in an opinion issued several days after the denial of Mr. Gardner's appeal, rejected the Second Circuit's reasoning that the protections against public disclosure afforded by Title III no longer apply once wiretapped information is used by law enforcement officials under Section 2517(2) to obtain search warrant affidavits. In denying an attempt by several newspapers to gain access to search warrant affidavits containing Title III materials where the government, as here, no longer opposed such disclosure, the Eighth Circuit reasoned:

We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily

³ The Second Circuit's suggestion that *Dorfman* can be distinguished and its reasoning limited on the ground that search warrant affidavits are "public documents" required to be filed with the court must be rejected. There was no less of an obligation to file with the court the documents at issue in *Dorfman* — sealed exhibits submitted by the government in opposition to a suppression motion — than there is to file a sealed search warrant affidavit.

avoided. The use and disclosure of wiretap information in search warrant affidavits pursuant to 18 U.S.C. § 2517(2) cannot transform the wiretap information into non-wiretap information unprotected by Title III. Acceptance of this argument would create a very large loophole in Title III.

John Does I-V v. The Pulitzer Publishing Co., 895 F.2d 460, 465 (8th Cir. 1990).

Beyond that, while the Second Circuit panel relied upon the filing requirements of Fed. R. Crim. P. 41 as creating some sort of a public right to search warrant affidavits even though they contain information protected under Title III, the reasoning of the Ninth Circuit is to the contrary. In rejecting an attempt by the media to gain access to search warrants and supporting affidavits, that court of appeals held:

[W]e cannot believe that Congress intended the bare filing requirement of Rule 41(g) to create . . . rights to warrant materials.

* * *

In sum, Rule 41(g) creates no new rights; it merely provides for the efficient and orderly maintenance of warrant materials.

Times-Mirror Co. v. United States, 873 F.2d 1210, 1220 (9th Cir. 1989).

A Sixth Circuit decision is also at odds with the reasoning of the Second Circuit on this point. In *United States v. Woods*, 544 F.2d 242, 243 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), a magistrate directed the filing of a search warrant affidavit containing the contents of intercepted communications, pursuant to Rule 41(g), after which it then was obtained by the media. Although the Sixth Circuit declined to dismiss the charges against the defendant as a result of this unauthorized disclosure, that court did indicate that the filing requirements of Rule 41 in no way obviate the restrictions imposed by Title III and directed:

[I]n view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

*Id.*⁴

This Court should resolve the conflict between the Circuits as to whether Title III must be read, as Congress wrote it, generally to prohibit disclosures of wiretapped information unless expressly authorized under Section 2517. Specifically, this Court should decide whether the inclusion of such information in search warrant affidavits vitiates the protections provided by Title III. Unless this Court resolves this dispute among the Circuits and conclusively interprets the Congressional intent concerning this issue, countless individuals subjected to such surveillance risk having their right to conversational privacy invaded through public disclosure of intercepted communications in a manner not contemplated or authorized by Title III.

⁴ The Second Circuit's reliance on Rule 41's filing requirements also conflicts with the reasoning of the Eighth Circuit that "wiretap information, even though it was contained in publicly filed pre-trial or trial documents, retained both its character as wiretap information and the protections against disclosure provided in Title III." *John Does I-V*, 895 F.2d at 465.

II. The Circuits are in conflict as to whether there is any public right of access to a search warrant affidavit containing intercepted communications, and whether such right, if any, outweighs the privacy rights of the subject of the warrant

In denying Mr. Gardner's appeal, the Second Circuit decided there is a common law right of access to the search warrant affidavit. (App. A at 10a). In so holding, and in rejecting Mr. Gardner's argument that his privacy rights protected under the Fourth Amendment and Title III trump any right to access based solely in the common law, the Second Circuit found it unnecessary to consider the district court's ruling that a limited right of public access can be found in the First Amendment. The Second Circuit's decision merely adds another view to the cacaphony of varied holdings proliferating among the Circuits as to the existence of any public right of access to search warrant affidavits, the foundation of any such right, and the manner in which any such right should be weighed against an individual's protected privacy rights.

The Ninth Circuit takes the position there is neither a common law nor a First Amendment right of access to search warrant affidavits, at least pre-indictment. See *Times Mirror Co.*, 873 F.2d at 1218-19. The Fourth Circuit has ruled there is only a common law right of access, expressly rejecting a claim for a constitutional right of access. See *In re Baltimore Sun Co.*, 886 F.2d 60, 64-65 (4th Cir. 1989). In contrast, the Eighth Circuit has recognized a qualified First Amendment right of access to such affidavits. See *In re Search Warrant for Secretarial Area (Gunn I)*, 855 F.2d 569, 573 (8th Cir. 1988).

The resolution of this burgeoning conflict among the courts of appeals has great importance to the determination of the overall issue of whether and when search warrant affidavits containing wiretapped information can be disclosed to the public.

First, if the reasoning of the Ninth Circuit in *Times-Mirror* is correct, which Mr. Gardner submits it is, and there is neither a common law nor a constitutional right of access to search

warrant affidavits containing wiretapped information, then there can be no basis to release such an affidavit in light of an individual's privacy interests protected under the Fourth Amendment and Title III.

Second, even if there is a common law right of access as the Second Circuit has now found, such a right must be contrasted with an individual's rights to conversational privacy protected under both the Fourth Amendment and Title III. Mr. Gardner argued before the Second Circuit that any common law right of access, even if one existed, must bow to the constitutional protections against invasions of conversational privacy recognized by this Court in *Katz*, 389 U.S. at 347. The Second Circuit did not expressly consider this argument, but apparently rejected it. Mr. Gardner also argued that Title III protections outweigh any right of access grounded solely in the common law; as noted above, the Second Circuit rejected that argument as well.⁵

Third, even if a qualified right of public access of some sort to search warrant affidavits does exist under the First Amendment, that right must still be weighed against an individual's privacy rights under the Fourth Amendment. In *John Does I-V*, *supra*, even though the Eighth Circuit recognized a qualified right of access to the affidavits under the First Amendment, it concluded the individual's privacy rights under the Fourth Amendment and Title III clearly outweighed such right to access and ordered the continued sealing of the affidavit.

Unless this Court intervenes and resolves this conflict among the Circuits, there can be no certainty as to whether a public right of access exists at all, and if it does, the basis of such a right and how it then should be weighed against an individual's right to conversational privacy. Without such direction from the only tribunal which can resolve this confusion among the Circuits, individuals like Mr. Gardner will face the intolerable prospect of having such search warrant affidavits publicly disclosed in one Circuit where they might not be disclosed in another.

⁵ Once Title III is found to bar disclosure, the statute may not be vitiated by any *balancing* against any rights of access. Rather, Title III's dictates may be ignored only if they are found to be unconstitutional.

At a minimum, this Court should grant certiorari in order to reverse the decision of the Second Circuit in this case that a purely common law right of access can outweigh an individual's constitutional and Title III conversational privacy interests. Such a holding directly conflicts with that of the Eighth Circuit in *John Does I-V* that even a qualified First Amendment right of access may be trumped by an individual's Fourth Amendment and Title III privacy rights. More fundamentally, in so ruling, the Second Circuit apparently has rejected this Court's firmly-established holding that the Fourth Amendment protects an individual's right to conversational privacy, in which case reversal is imperative lest a constitutional right be sacrificed to advance an interest devoid of any constitutional foundation.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

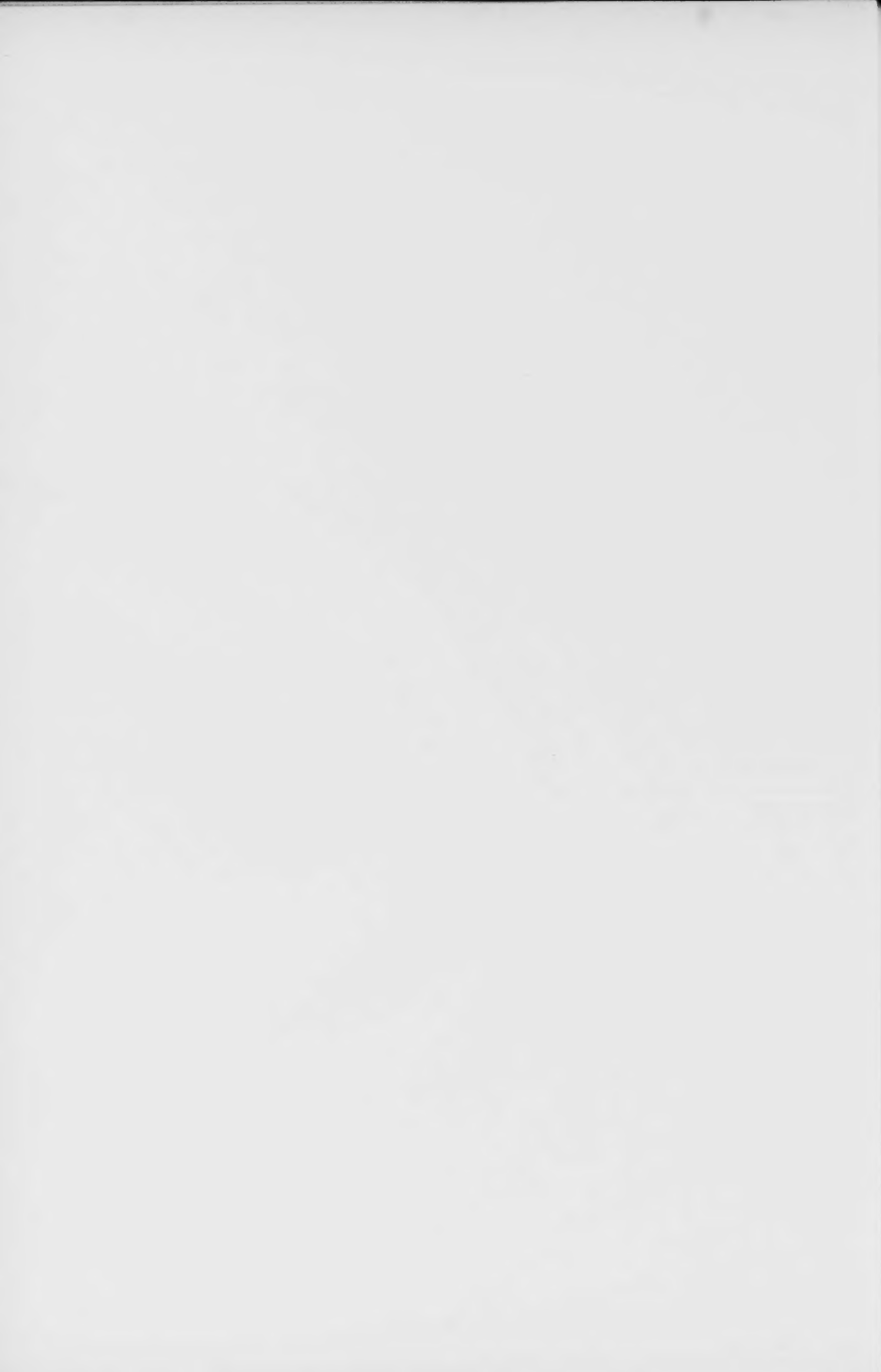
MICHAEL J. DELL
(Counsel of Record)

GARY P. NAFTALIS
PETER J. GANZ

KRAMER, LEVIN, NESSEN, KAMIN
& FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioner
Charles F. Gardner

APPENDIX



APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 395, 396 — August Term 1989

Argued: September 26, 1989 Decided: January 29, 1990

Docket Nos. 89-6169, 89-6177

IN RE APPLICATION OF NEWSDAY, INC.

IN RE APPLICATION FOR LIMITED UNSEALING OF
AFFIDAVIT SUPPORTING SEARCH WARRANT
DATED JUNE 13, 1988

CHARLES F. GARDNER,

Appellant,

-v.-

NEWSDAY, INC.,

Appellee.

Before:

OAKES, PIERCE, and RUBIN,*

Circuit Judges.

* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

Appeal from order of the United States District Court for the Eastern District of New York, Edward R. Korman, J., releasing redacted search warrant application.

Affirmed.

MICHAEL J. DELL, New York, NY (Gary P. Naf-talis and Suzanne L. Telsey, Kramer, Levin, Nessen, Kamin & Frankel, of counsel), *for Appellant Charles F. Gardner*.

ROBERT LLOYD RASKOPF, New York, NY (Harry T. Walters and Paul S. Grobman, Townley & Updike and Nancy Richman, Times Mirror Company, of counsel), *for Appellee Newsday*.

MAURY S. EPNER, Washington, D.C. (Henry E. Hudson and Joseph J. Aronica, Department of Justice, of counsel), *for amicus curia the United States*.

ALVIN R. RUBIN, *Circuit Judge*:

Newsday, a newspaper, sought access to a search-warrant application containing information obtained by a wiretap. The application has been sealed by the district court at a request of the government. Following a guilty plea by the subject of the wiretap, the government withdrew its earlier objection to unsealing the application, and the district court released a redacted copy of the warrant materials. The subject of the wiretap appeals from this decision contending that the provisions of the federal wiretap statute forbid public disclosure in such a manner of information obtained by a wiretap. Without deciding whether, as contended by Newsday, the press has a constitutional right of access to documents contained in search warrant applications, we hold that the district court properly balanced the common law right of access to judicial records with the

defendant's privacy rights, and affirm its release of a redacted copy of the warrant application.

I.

Yesterday's front page news leads to today's lawsuits. The Federal Bureau of Investigation launched an investigation of possible kickbacks to Defense Department employees and other unlawful procedures in military procurement. The FBI obtained court authorization to tap the phone of Charles Gardner, a former employee of the Unisys Corporation, who was a key figure in the investigation. An FBI agent then used information obtained by the wiretap in an affidavit supporting an application for a search warrant of Gardner's home. The warrant was signed by a judge of the Eastern District of New York and executed the next day. A month later, in response to a motion by Newsday to unseal the entire affidavit, the judge heavily redacted the affidavit and unsealed a small part of it, disclosing only a few paragraphs describing Gardner's house.

The government later withdrew its objection to unsealing specified portions of the affidavit, so the district court ordered the release of those portions of the affidavit to Gardner and Dennis Mitchell, a business associate of Gardner and another subject of the investigation. Neither Gardner nor Mitchell was ever charged with any crime in the Eastern District of New York, but, later, after both had pled guilty to criminal informations filed in the Eastern District of Virginia, the government dropped its objection to release of the affidavit in its entirety. Gardner, however, continued to object to public disclosure. Thereafter, the district court rendered an oral opinion, granting Newsday's application to unseal both the search warrant and the search-warrant affidavit subject to redaction of extraneous material and references to third parties not subject to criminal investigation. On Gardner's motion, it stayed this order pending expedited appeal to this court.

Relying on *Press-Enterprise Co. v. Superior Court*,² the district court found that there was a qualified constitutional right of

² 478 U.S. 1 (1986).

access to the warrant application, stemming from (1) a tradition of accessibility to such materials by the press and public, and (2) the significant role in the functioning of the search and seizure processes that such access would play.³ Noting that a statute should not be construed so as to conflict with a constitutional right, the court held that Title III of the Omnibus Crime Control and Safe Streets Act of 1968⁴ did not bar release of the intercepted communications. The court further held that it was required to balance the qualified right of access against Gardner's and Mitchell's privacy rights. Because of the legitimate public interest in the case and the fact that the defendants' privacy interests had been diminished by their guilty pleas and by the mundane business nature of the recorded conversations, the court ordered the application to be unsealed, redacting only those portions of the affidavit that gave the names of individuals or corporations that had not been indicted or otherwise disclosed.

Gardner argues that Title III forbids the disclosure of wiretap information used in a search warrant application, and that no qualified right of access exists. Since Title III is comprehensive, and was enacted to address constitutional concerns over the intrusiveness of wiretapping,⁵ Gardner argues further that any qualified right of access that may exist is overridden in this case by his privacy rights. The government now takes the position that Title III does not forbid disclosure and that the district court's order should be affirmed. *Newsday* also does not appeal the district court's order.

II.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 creates a comprehensive scheme limiting the use of various forms of electronic surveillance, providing under what

³ See *id.* at 8-9.

⁴ Current version at 18 U.S.C. §§ 2510-2521 (1988).

⁵ See *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

circumstances electronic surveillance may be employed, and controlling the later use of information obtained by such means. “[P]rotection of privacy was an overriding congressional concern” in framing the statute,⁶ and Congress sought to strike an acceptable balance between the privacy rights of individuals and the legitimate needs of law enforcement.⁷ The statute does not, however, address the issue of public access to intercepted communications when those communications become part of a public document after having been used by the government in the course of its law enforcement activities.

Section 2511 of Title III makes it a crime intentionally to disclose communications in violation of Title III.⁸ Section 2515 creates a separate barrier by forbidding the use of intercepted communications in any judicial proceeding except as authorized by the statute.⁹ Section 2517 describes three situations in which intercepted communications may lawfully be used. Subsection 1 permits “any investigative or law enforcement officer” who has lawfully obtained knowledge of the contents of any intercepted communication to “*disclose* such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate” in the performance of their official duties.¹⁰ Subsection 2 authorizes investigative or law enforcement personnel who have lawfully obtained knowledge of any intercepted communications “to *use* such contents to the extent such use is appropriate to the proper performance of [their] official duties.”¹¹ Subsection 3 permits “*any person*” who has received “any information concerning” intercepted communications “to *disclose* the contents of that communication or such

⁶ *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

⁷ See *National Broadcasting Co. v. United States Dep’t of Justice*, 735 F.2d 51, 53 (2d Cir. 1984).

⁸ 18 U.S.C. § 2511(1) (1988).

⁹ *Id.* § 2515.

¹⁰ *Id.* § 2517(1) (emphasis added).

¹¹ *Id.* § 2517(2) (emphasis added).

derivative evidence while giving testimony . . . in any proceeding held under the authority of the United States or of any State or any political subdivision thereof.¹²

Aside from these permitted uses, Title III requires sealing of intercepted communications and grants certain procedural rights to any party whose communications were intercepted. Section 2518(8)(a) provides in part that recordings of intercepted communications "shall be made available to the judge issuing [the Title III order] and sealed under his directions."¹³ It also permits duplicate recordings of the intercepted communications to be made for use or disclosure pursuant to the provisions of § 2517.¹⁴ Section 2518(9) provides that, at least ten days before evidence relating to any intercepted communication is received in evidence "or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court," each party shall be provided with a copy of the order under which the interception was carried out, unless the judge finds that such advance notice was not possible and that prejudice will not result.¹⁵ Finally, § 2518(10) provides in part that any person who was a party to an intercepted communication may move to suppress the contents of such communication on the grounds that it was intercepted unlawfully, or pursuant to an order insufficient on its face, or not in conformity with a lawful order.¹⁶

Gardner argues that "disclosure" by testimony in court pursuant to § 2517(3) is the exclusive means by which intercepted communications may be released to the public, relying in part on the difference in meaning between the words "use" and "disclose" employed in § 2517(2) and (3), and the procedural safeguards provided in § 2518 for disclosure pursuant to § 2517(3).

¹² *Id.* § 2517(3) (emphasis added).

¹³ *Id.* § 2518(8)(a).

¹⁴ *Id.*

¹⁵ *Id.* § 2518(9).

¹⁶ *Id.* § 2518(10).

Gardner cites a Seventh Circuit case, *United States v. Dorfman*,¹⁷ which held that § 2517(3) was the exclusive means of public access to exhibits containing wiretap materials submitted by the government in opposition to a motion to suppress the fruits of wiretapping at their previous trial.¹⁸ Beginning with the premise, "Title III implies that what is not permitted is forbidden,"¹⁹ the *Dorfman* court concluded:

The draftsmen [of Title III] must have known that most criminal proceedings are conducted in public, so probably they expected (if they thought about the matter) that most testimony authorized by section 2517(3) would end up in the public domain. But we find no evidence that they wanted to create a right of public access.²⁰

We agreed that Title III generates no right of access, but it is a non-sequitur to conclude the obverse: that Congress intended in § 2517, which relates solely to use in law-enforcement activities and judicial proceedings, to forbid public access by any other means on any other occasion. While the *Dorfman* opinion did state, "the only lawful way [intercepted materials] can be made public over the defendants' objection is by being admitted into evidence in a criminal trial or other proceeding,"²¹ the court noted "[t]he usual disposition of evidence submitted to a court in a preliminary hearing but no longer required by the court is to return it to the party who submitted it."²² Unlike the exhibits proffered in *Dorfman*, search warrants and the affidavits that

¹⁷ 690 F.2d 1230 (7th Cir. 1982).

¹⁸ *Accord In re Sealed Search Warrant for Cubic Corp.*, No. 88-2945M, 1989 WL 1607 (S.D. Cal. Feb. 22, 1989).

¹⁹ 690 F.2d at 1232.

²⁰ *Id.* at 1233.

²¹ *Id.*

²² *Id.*

precede their issuance are public documents required by Rule 41 of the Federal Rules of Criminal Procedure to be filed with the clerk of the issuing court.²³ *Dorfman*, therefore, deals with materials that were not required to be, and were not, filed in the court's records.

The difference between the words "use" and "disclose" in subsections 2 and 3 is not itself sufficient to support the inference that secrecy is commanded except when the materials are used pursuant to the specific provisions of subsection 3. "Use" under subsection 2 is not limited to a derivative reference, but permits quotation of the contents of intercepted communications. The choice of the word "disclose" in subsection 3 reflects its purpose of permitting any person, not merely a law enforcement official, to testify to the content of the intercepted communication.

In short, nowhere does Title III state rules regarding disclosure of intercepted communications to the public incident to, or after, their use under § 2517. Indeed, the major cases on public access to judicial proceedings and records, discussed *infra*, postdate the enactment of Title III. No doubt the framers of Title III expected that the main channel of public disclosure of intercepted communications would be testimonial, but they did not so confine it.

III.

That Title III does not forbid public access to the warrant application does not of itself mean that there is a right of access to such materials. To determine whether there is such a right, we first look to the common law, for we need not, and should not, reach the First Amendment issue if judgment can be rendered on some other basis.

In *Nixon v. Warner Communications, Inc.*,²⁴ the Supreme Court stated that, under the common law:

²³ See Fed. R. Crim. Proc. 41(g).

²⁴ 435 U.S. 589 (1978).

the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.²⁵

This jurisprudentially established right of access had, the Court observed, been "an infrequent subject of litigation," whose "contours have not been delineated with any precision."²⁶ Recent cases have begun to define more clearly the scope of the right with respect to search warrant materials.

In *Times Mirror Co. v. United States*,²⁷ the Ninth Circuit held that there was no constitutional or common law right to inspect a warrant application during the pendency of the investigation.²⁸ On the other hand, in *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*,²⁹ the Eighth Circuit held that there was a qualified constitutional right of access to search warrant applications once the warrant had been executed, even if the investigation had not been completed.³⁰ Taking a middle position, the Fourth Circuit, in *In re Baltimore Sun Co.*,³¹ agreed

²⁵ *Id.* at 597-98 (citations omitted); see also *In re Application of National Broadcasting Co.*, 635 F.2d 945, 949 (2d Cir. 1980).

²⁶ *Id.* at 597.

²⁷ 873 F.2d 1210 (9th Cir. 1989).

²⁸ *Id.* at 1218-19.

²⁹ 855 F.2d 569 (8th Cir. 1988).

³⁰ *Id.* at 573.

³¹ 886 F.2d 60 (4th Cir. 1989).

with the Ninth Circuit that there was no constitutional rights of access, but held that a common law right of inspection attached once the warrant had been filed.³²

Times-Mirror focused on the question of rights of access "during the pre-indictment stage of an ongoing criminal investigation."³³ In this case, Gardner resists disclosure at a later point, after he has pled guilty to a criminal information. Without deciding whether we would concur in *Times-Mirror's* result, we decline to extend its holding. Here, the warrant has been executed, a plea-bargain agreement has been reached, the government admits that its need for secrecy is over, and the time has arrived for filing the application with the clerk.³⁴ In these circumstances, there is a common law right to inspect what is commanded thus to be filed.

Noting that none of the cases discussed above addressed the issue of access to affidavits containing communications intercepted under Title III, Gardner cites language from *Times Mirror* that "there is no right of access to documents which have traditionally been kept secret for important policy reasons."³⁵ He argues that the congressional protection of privacy interests by Title III represents a similar important policy that overrides the common law right of access.³⁶ The *Times Mirror* court was referring to a class of documents, grand jury records, to which no general right of access has ever been recognized. In contrast, the fact that search warrants are commonly filed under seal until the warrant is executed does not change their status as public documents.

³² *Id.* at 64-65.

³³ 873 F.2d at 1221.

³⁴ See *Baltimore Sun*, 886 F.2d at 65.

³⁵ *Times Mirror*, 873 F.2d at 1219.

³⁶ See also *In re Sealed Search Warrant for Cubic Corp.*, No. 88-2945M, 1989 WL 1607 (S.D. Cal. Feb. 22, 1989).

As the *Baltimore Sun* court noted, the government must move to seal the warrant, and the ultimate decision to grant the motion rests with the judicial officer to whom the motion is made. "If someone desires to inspect the papers, an opportunity must be afforded to voice objections to the denial of access."³⁷ The presence of material derived from intercepted communications in the warrant application does not change its status as a public document subject to a common law right of access, although the fact that the application contains such material may require careful review by a judge before the papers are unsealed.

IV.

Gardner makes a final argument that, even if there is a right of access to search warrant applications that contain intercepted communications, the district court judge did not properly balance this right against Gardner's privacy rights in this case. We hold that the common law right of access is qualified by recognition of the privacy rights of the persons whose intimate relations may thereby be disclosed; in this case, the district court judge gave due consideration to the privacy rights of Gardner and other parties to the intercepted communications, and did not abuse his discretion in ordering release of the redacted affidavit.

As the Supreme Court said in *Nixon*, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."³⁸ Relying on the *New York Times* line of cases,³⁹ the district court balanced the public's right of access with Gardner's and Mitchell's Title III privacy interests.

³⁷ *Baltimore Sun*, 886 F.2d at 65.

³⁸ 435 U.S. at 599 (citations omitted).

³⁹ *In re New York Times*, 828 F.2d 110 (*New York Times I*) (2d Cir.), after remand 834 F.2d 1152 (*New York Times II*) (1987), after remand 837 F.2d 599 (*New York Times III*), cert. denied, 108 S. Ct. 1272 (1988).

Under the *New York Times* test, "the court should consider 'whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes.'"⁴⁰ In addition:

[T]he privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure of the Title III material should weigh heavily in a court's balancing equation. . . . The job of protecting such interests rests heavily with the trial judge, since all the parties who may be harmed by disclosure are typically not before the court.⁴¹

Under the *New York Times* standard, a district court has the authority to redact a document to the point of rendering it meaningless,⁴² or not to release it at all,⁴³ but such drastic restrictions on the common-law right of access are not always appropriate.⁴⁴ The record shows that the district court was aware of the privacy interests at stake, and redacted references to innocent third parties. Gardner was provided with a copy of the intercepted communications, and had ample time to formulate specific objections to disclosure.⁴⁵ Considering the facts of this case and the nature of the intercepted communications, we find that the district court did not abuse its discretion.

For these reasons, the order releasing the search warrant affidavit as redacted is **AFFIRMED**.

⁴⁰ *New York Times I*, 828 F.2d at 116 (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

⁴¹ *Id.*

⁴² *New York Times II*, 834 F.2d at 1154.

⁴³ *United States v. Genera*, 869 F.2d 82, 86 (2d Cir. 1989).

⁴⁴ See *In re Search Warrants Issued on June 11, 1986*, 710 F. Supp. 701, 705 (D. Minn. 1989).

⁴⁵ Cf. 18 U.S.C. § 2518(9), (10) (1988).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In Re: 88 MISC 286
APPLICATION :
of United States
NEWSDAY : Courthouse
Brooklyn, New York
July 27, 1989
: 1:00 o'clock p.m.

-----X
TRANSCRIPT OF DECISION
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

ROBERT RAPSKOFF, ESQ.
Attorney for Newsday

MICHAEL DELL, ESQ.
Attorney for Gardner

JAMES CATTERSON, ESQ.
Attorney for Mitchell

JOSEPH ARONICO, ESQ.
MAURY EPNER, ESQ.
Attorneys for Government

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

(Telephone conference.)

THE COURT: All right. I have scheduled this conference because I am ready to decide *Newsday's* application. I don't want to hold it up for the purpose of drafting an opinion, although I may draft a formal opinion later on.

To begin with, I agree with the Court of Appeals for the Eighth Circuit, that search warrant applications enjoy a qualified First Amendment right of access once the initial reason for the sealing ends; that is, once the search warrant has been executed and once there is no longer any jeopardy to the investigation by disclosure, in *Re: Search Warrant For Secretarial Area Outside Office of Thomas Gun*, Appeal of Pulitzer Publishing Co., 855 Fed 569, Eighth Circuit, 1988. Traditionally, search warrant applications are unsealed. They become part of the public record and public access to such individuals is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial and judicial misconduct, *Id.* at 573.

The reasoning of the Eighth Circuit seems to me also to be supported by a long line of cases in the Second Circuit, which culminated only this month with the decision of the Court of Appeals in *United States versus Suarez*, July 7, 1989, which held that applications by defense lawyers under the Criminal Justice Act, that is, CJA forms approving payment to counsel and others, enjoyed a qualified first amendment right of access.

There the Court of Appeals particularly stressed the significant public interest in such materials. It seems to me there is a significant, a very significant public interest in examining search warrants in general because they establish, or they deal with the manner in which the Judicial Branch functions on applications that relate to invasions of privacy of individual citizens.

It also seems to me that interest is doubly present in this case, which involves the functioning of the Judicial Branch on applications by the Executive Branch relating to fairly significant matters of public interest and relating to individuals who are not just ordinary citizens. It seems to me that in the context there is a special public interest that deserves to be vindicated.

Just to cite one example of what I mean, without necessarily passing any judgment on whether what was done was right or wrong; but in the search warrant application, when members of Congress were alluded to, with some exception, they were given letters, like Senator A or Senator B or Congressman A or Congressman B, whereas when other individuals, who may or may not have been directly involved, were identified by name.

Again, I am not being critical of it. I am simply pointing out that it is a matter of interest what happens in these cases and how these applications are handled and treated.

I have looked at the Freedom of Information Act case that was cited to me by Mr. Gardner's lawyer, and the case is distinguishable because it involves a construction of the Freedom of Information Act, and is really limited to a construction of that act, and is not really of significant precedential value beyond it.

However, there is language in there that seems to me to have some applicability here, and the Court at page 1485 of 109, Supreme Court, says:

The privacy interest in obtaining and maintaining the practical obscurity of rap sheet information will always be high when the subject of such a rap sheet is a private citizen and when the information is in the government's control as a compilation rather than a record of what the government is up to. The privacy interest protected by Exemption 7(c) is in fact at its apex, while the F.O.I. based public interest in disclosure is at its nadir.

In this particular case, we are dealing with information about what the government is up to, how it functioned, and what normally becomes a public record; and it seems to me that the public

interest here is at its apex, which is not to say there aren't significant privacy interests to be dealt with. I will deal with them in a moment.

I turn now to the wiretap statute, 18 U.S.C., Section 2517. I don't read the wiretap statute as precluding disclosure of the search warrant applications in this context. I suppose they could probably be so construed, but the disclosure was properly made to me in order to get a search warrant and I don't see anything in the statute that says that I have to seal that application simply because it is in part based on wiretap materials.

Moreover, because it seems to me there is a qualified First Amendment right of access, interest under a number of long line of Supreme Court court cases, the wiretap statute should be construed in a manner which does not — if it can be reasonably so construed — in a manner which does not create a significant constitutional problem.

The Supreme Court just reiterated that principle last month in *Public Citizen versus the United States Department of Justice*. That was decided on June 21st.

So on the one hand I find a qualified First Amendment right of access. On the other hand, I find that the wiretap statute doesn't expressly prohibit the disclosure. I think it should be construed as not prohibiting that disclosure, because to do otherwise would create a constitutional problem.

That brings me to the question of discretion. To say that there is a qualified First Amendment right of access doesn't mean that everything has to be disclosed. I think there are, in the abstract, in any event, significant privacy interests at stake any time one deals with a disclosure of information that's obtained as a result of a wiretap order.

However, as the Second Circuit cases in this area indicate, it cannot be that every conversation overheard has to be kept under seal. One has to make some judgment as to what conversations can be releases without an unwarranted invasion of

privacy and what can't. See e.g. *United States v. Gerena* decided February 17, 1989, Second Circuit.

In addition, it seems to me, the word "privacy" has different meanings, and one has to be careful in how one defines it. I am going to try and deal with the various meanings that I think are relevant in this particular context.

First, with respect to Gardner and Mitchell, who were the individuals whose telephones were overheard, they have now both — and they were the individuals whose offices or homes, or both, were searched pursuant to the search warrant — they now have both pled guilty. They have admitted the criminal wrongdoing, and it is publicly known that they were the subjects of a criminal investigation.

The conversations which are either quoted from in the wiretap application or are summarized do not involve what could be described as personal matters. They don't involve privileged communications. They don't, it seems to me, involve conversations that one would think would warrant some sort of special protection. At best, taken in the light most favorable to Gardner and Mitchell, they are mundane business conversations. They don't involve trade secrets, for example, or other kind of privileged business communications.

Of course, at worst, they constitute evidence of criminal activity.

To the extent that they constitute evidence of criminal activity, it seems to me, it is hard to say that there is a legitimate privacy interest in those conversations. For engaging in conversations that are in furtherance of criminal activity, people can be prosecuted. It seems to me to be stretching it a bit to say that there is a privacy interest in those kinds of conversations.

This is not to say that law enforcement officers are free to go around wiretapping any time they suspect criminal activity, and that if they find the evidence of it, that somehow the Constitution or the laws of the United States have not been violated.

It is important, however, to keep in mind that what we do in suppressing illegally seized evidence, that is, conversations that are illegally seized or not seized in compliance with the law, is we are protecting privacy in the broad sense. That is, what we are doing is we are saying we are excluding these conversations, even though they are relevant, even though someone could otherwise be prosecuted for it, because we don't want law enforcement officers to go and conduct eavesdropping or other kinds of searches without complying with the Constitution and without complying with the laws of the United States.

If we simply allowed evidence to come in because what was found as a result of police activity was evidence of crime, then there would be no deterrent to illegal police conduct and no protection of privacy.

That seems to me to be far different from saying that evidence of criminal activity somehow enjoys some sort of privacy protection of the kind that I think I should be concerned about here.

To the extent that the considerations that I have alluded to earlier about deterring law enforcement officers from conducting illegal searches and seizures plays a role in suppression, it is to me significant here, number one, that all of the wiretap material were obtained pursuant to court order, that the two individuals who had the greatest, arguably the greatest interest in challenging the validity of those wiretaps, and in invoking the Exclusionary Rule to avoid possible criminal prosecution, chose to bargain with the government and plead guilty instead.

That doesn't mean that there isn't anything wrong with the wiretap orders, but that there is a case where there was clearly an effort to comply with the law and no significant showing has been made that the law has not been complied with.

Now, there are obviously parties to these conversations other than the individuals who were the subjects of the search warrants and who may not have pled guilty. Indeed, although I don't have a complete list of exactly who pled guilty, it seems quite

clear to me that a number of people who are parties to conversations have not pled guilty.

This brings me to another aspect of the privacy interests that I think are at stake here. I don't know if "privacy" is the right word for it. That is besides the point. It is privacy in a broad sense. That is, my concern about individuals who may have, at most, some peripheral involvement, not involved at all, whose names come up perhaps in one conversation or two, might have their reputations unfairly tarnished. The same is true with other individuals whose names appear in the course of the application and who may not be involved in criminal activity at all.

The way I propose to deal with that aspect of privacy, that is, not having one's name smeared across the newspapers, one who may not be guilty of wrongdoing, is in two ways.

First, there are parts of the search warrant applications, particularly near the end, in which I authorize, for example — let me just get out Paragraph 72, which is an example, where the agent who swore out the application identifies certain evidence relating to corporations or individuals which he says would be evidence of criminal activity.

To the extent that either corporations or individuals are named in 72, for example, one and two, I am going to delete that, except to the extent that's already been disclosed in prior orders releasing parts of this affidavit.

The same is true with respect to Paragraph 80, number one, and the same is true with respect to Paragraph 83(e). I'm sorry. 83(e) falls into a different category, for the moment. 84(c)(1). By deleting those names, for the moment, what I am doing is simply sparing people from being tinged with a charge that they are involved in criminal activity. However, I am not withholding any information. That is, for the moment, to the extent that these individuals are referred to in the course of the search warrant application, that will be disclosed.

So that facts about them are not being withheld. It is simply the suggestion in these paragraphs that, just because evidence

relating to them is being authorized to be seized, these individuals are involved in criminal activity. It is to that extent that I am trying to protect them.

The other way that I propose to protect some individuals who are parties to the intercepted conversations whose names only come up perhaps on one or two occasions, who at least appear to me to be peripheral characters and as to whose complicity I have some doubt is to delete their names. That would include the name in Paragraph 38, the name in Paragraph 43.

When I say "the name," Mr. Arnoico, I mean the name of the other party to the conversation other than the subject.

The name in 49. Let me just take a look. I'm sorry. I must have the wrong paragraph. I'm sorry.

It is Paragraph 48. I'm sorry. Paragraph 48, the names in the sentence beginning with the words "many of the reports" and ending with the words "private consultant." Then the next sentence, the names of the two individuals who are not the subjects of the wiretap.

And Paragraph 50, the fourth sentence, beginning with "Gardner spoke to Mulldoon," and ending with the word "help."

In Paragraph 58, the name of the individual other than the subject matter of the wiretap.

In Paragraph 63, the name of the individual affiliated with Grumman.

In Paragraph 65, the name of the UNYSIS official.

In Paragraph 66, the name of the person identified as "a defense consultant."

In paragraph 67, the name of the individual affiliated with another defense company.

In Paragraph 83(e), the names of the individuals other than William Galvin.

And in the appendix, at the beginning of the search warrants, the Attachment A both to the Mitchell and Gardner affidavits, the names of the companies and individuals in paragraph one, except to the extent that it was already released when I authorized the release of prior versions of this application.

Now, I invited Mr. Mitchell and Mr. Gardner to write me letters in camera expressing any special concerns that they had. I did not get any communication from Mr. Mitchell. I did get a communication from Mr. Gardner, and I have attempted to deal with at least one part of the Gardner request by what I have excluded.

I think you know what I am talking about. Mr. Dell?

MR. DELL: That is correct, Your Honor.

THE COURT: I have gone through this fairly carefully. If I have missed other places where those same names are, you will let me know. But I think I have covered it.

MR. DELL: We will take a look through.

Thank you.

THE COURT: That's it. What I would like to do here is work out a procedure in terms of — I'd like you to make the deletions, Mr. Aronico, that I have indicated, and send me the copy with those deletions made so I can take one last look at it. Then I don't know what you want to do. Do you want to appeal?

MR. DELL: Your Honor, could we have a stay so that we could take an appeal?

THE COURT: Yes, on the condition that you file a notice of appeal within seven days and that you make an application to the Court of Appeals for an accelerated briefing schedule.

MR. CATTERSON: The same thing for the defendant Mitchell, Your Honor.

THE COURT: All right. Could you send me, Mr. Aronico, the copy anyway, so that I can get this in shape for the Court of Appeals? I've got all the papers together here. I want to straighten the file out.

MR. ARONICO: We will try to do that. We may be in touch with your law clerk just in case we missed anything.

THE COURT: Okay. There is a court reporter here taking everything down, so you can order the minutes. In that way there will be no mistake.

MR. ARONICO: We may do that, then.

THE COURT: Okay.

MR. ARONICO: Apparently, Judge, since you granted the stay, there is no urgency to it.

THE COURT: There is no urgency in the sense that you don't have to do it today. I would like it within the next week.

MR. ARONICO: Fine.

Appendix C

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14 day of March, one thousand nine hundred and ninety

IN RE APPLICATION NEWSDAY, INC.

IN RE APPLICATION FOR LIMITED UNSEALING OF
AFFIDAVIT SUPPORTING SEARCH WARRANT
DATED JUNE 13, 1988

DOCKET NUMBER
89-6169, 89-6177

CHARLES F. GARNDER,

Appellant,

v.

NEWSDAY, INC.,

Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, Charles F. Gardner

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

